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I. INTRODUCTION

Conservation easements are negative restrictions that impose limitations on the owner of burdened land for conservation purposes.[1] Landowners, government entities, and non-profit organizations create conservation easements for a variety of purposes that may include preservation of ecological, natural, open, or scenic features.[2] Conservation easements have unique characteristics distinct from common law servitudes. Conservation easements are statutorily created, negative easements in gross.[3] In other words, a conservation easement creates a particular right in its holder to restrict burdened land from being used in a certain way and allows this restriction to run with the land. This characterization is distinct from common law easements, which are traditionally affirmative, and when in gross, are neither transferable nor assignable.

State enabling statutes define conservation easements and describe their scope and applicability. In 1981, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") created the Uniform Conservation Easement Act ("UCEA") for the purpose of enabling "durable restrictions and affirmative obligations to be attached to real property to protect natural and historic resources."[4] The UCEA allows for the creation, conveyance, recording, assignment, release, modification, and termination of conservation easements in the same manner as traditional easements.[5] The NCCUSL chose to characterize conservation easements this way for a number of reasons, including; legal professionals' familiarity with easement law and the current absence of traditional limitations once imposed on easement doctrine.[6] Of the states that have not adopted the specific language of the UCEA language, many states have statutes with

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[1] *See* UNIF. CONSERVATION EASEMENT ACT § 1(1) (1981).
[2] *Id.*
[3] Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 435-437 (1984).
[4] UNIF. CONSERVATION EASEMENT ACT Prefatory Note (1981).
[5] *Id.* § 2(a).
[6] *Id.* Prefatory Note.

similar provisions to the UCEA,[7] while a few states treat conservation easements in a unique fashion.[8]

In addition to equating the treatment of conservation easements to common law easements for purposes of creation, modification and termination, the UCEA provides for the enacting jurisdiction to modify or invalidate conservation easements in accordance with its principles of law and equity.[9] When these two provisions are read together, the UCEA and adopting jurisdictions allow for modification and termination of conservation easements in accordance with the enacting jurisdiction's easement law. Currently, a little fewer than half of all jurisdictions incorporate both provisions in their enabling statute.[10]

Jurisdictions allow for termination and modification in various ways depending on language incorporated in its statute. While some jurisdictions provide language allowing for termination and modification based on easement law, a number of states provide different statutory language. Some jurisdictions allow for modification and termination of conservation easements through a public hearing process,[11] while other jurisdictions specifically allow for application of common law doctrines to modify and extinguish conservation easements.[12] Additionally, a large number of jurisdictions fail to address the issue completely.[13]

A lingering and unsettled question regarding conservation easements is how courts should remedy a perpetual conservation easement that no longer serves the purpose for which it was originally created. In response to this issue, many scholars debate what remedy should apply to account for the viable use of land for future generations. Of the doctrines applied to terminate

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[7] *See, e.g.,* COLO. REV. STAT. ANN. § 38-30.5-107 (West 2010) (stating that conservation easements may, "[I]n whole or in part, be released, terminated, extinguished, or abandoned by merger with the underlying fee interest in the servient land or water rights or in any other manner in which easements may be lawfully terminated, released, extinguished, or abandoned").

[8] *See, e.g.,* MD. CODE ANN., REAL PROP. § 2-118 (West 2010) (a conservation easement is, "in the form of an easement, covenant, restriction, or condition").

[9] UNIF. CONSERVATION EASEMENT ACT § 3(b) (1981).

[10] *See infra* note 104.

[11] *See, e.g.,* MASS. GEN. LAWS ANN. ch. 184 §§ 31-32 (West 2010).

[12] *See infra* note 106.

[13] ARK. CODE ANN. § 15-20-404 (2010).

traditional easements, the doctrine of changed conditions is the most significant grounds for termination of conservation easements.[14] Although some jurisdictions allow for application of the doctrine, termination based on changed conditions may pose a "problematic" issue, according to the NCCUSL in the Uniform Conservation Easement Act ("UCEA").[15]

This paper examines how state statutes address the issue of modification and termination of conservation easements and the doctrine of changed conditions. This analysis is achieved by: (1) examining a comprehensive statute that incorporates the doctrine of changed conditions and (2) examining a statute that provides little guidance regarding the treatment of outmoded conservation easements.

Conservation easements can perpetually restrain the use of property for future generations and, absent specific statutory or decisional law within a jurisdiction, may inadequately address the issue of change. Although some jurisdictions provide adequate remedies, many jurisdictions lack sufficient statutory language or decisional law that deal with this concern. For this reason, an enabling statute that provides for application of the doctrine of changed conditions with a sufficiently strict standard, while also reserving the rights of parties to provide their own modification and termination language within the conservation easement instrument, provides a benefit to future generations as well as current conservation easement holders.

II. THE NATURE OF CONSERVATION EASEMENTS

An easement is "an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose."[16] An easement creates two distinct property interests: a "dominant estate" that has the right to use land of another, and the "servient estate" that

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[14] *See generally* Jeffrey A. Blackie, Note, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L.J. 1187 (1989).
[15] UNIF. CONSERVATION EASEMENT ACT § 3(b) (1981).
[16] BLACK'S LAW DICTIONARY 430 (8th ed. 2005).

allows the exercise of that use.[17] Easements are either appurtenant or in gross. Easements appurtenant are those in which there is a right to use the servient estate for the benefit of the dominant estate.[18] An easement in gross is defined as, "An easement benefiting a particular person and not a particular piece of land."[19]

In addition, common law easements are either affirmative or negative. Affirmative easements confer a privilege to a person to use the land of another.[20] Negative easements confer a right on the dominant estate owner to restrict the land from being used in certain ways by the servient owner.[21] Common law recognized only four negative easements that included light, air, view, support of buildings, and stream flow, none of which included preservation of the natural resources or open and scenic characteristics of land.[22]

Conservation easements are negative restrictions that impose limitations on the owner of burdened land for the purpose of preserving its ecological, natural, open, or scenic features.[23] Conservation easements are "an outgrowth of three distinct common law devices that enable their owner or beneficiary to control the use of property owned by another: easements, real covenants, and equitable servitudes."[24] Conservation easements are distinct from easements in a number of ways.[25] Traditionally under the common law, easements were affirmative interests, whereas negative interests were either "covenants" or "equitable servitudes."[26] In addition to being negative, conservation easements are also in gross. Historically, easements in gross are

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[17] 25 AM. JUR. 2D *Easements and Licenses* § 1 (2004).
[18] 25 AM. JUR. 2D *Easements Appurtenant* § 8 (2004)
[19] BLACK'S *supra* note 16, at 432.
[20] *Id.*
[21] *Id.* at 433.
[22] GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS AND EQUITABLE SERVITUDES 1-4 (2d ed. 2004).
[23] *See* UNIF. CONSERVATION EASEMENT ACT § 1(1).
[24] John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENVTL. LAW. 319, 325-326 (1997).
[25] *See* Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 UTAH L. REV. 1039, 1052 (2007).
[26] *Id.*

not transferable or assignable. However, most states adopted statutory language modifying this limitation.[27]

Additionally, conservation easements are created by statute. Currently, at least 49 states, as well as the District of Columbia, have enabling statutes in place allowing for the creation of conservation easements.[28] The enabling statutes define the attributes, scope and treatment of conservation easements within the governing jurisdiction.[29]

Although each state's conservation easement statute varies in its reach and application, the main features of the statutes can be seen in the UCEA. The Commissioners on Uniform State Laws addressed the issue of whether conservation easements should be treated as easements or another property interest in the Commissioner's Prefatory Note of the Uniform Conservation Easement Act, stating:

> The easement alternative is favored in the Act for three reasons. First, lawyers and courts are most comfortable with easements and easement doctrine, less so with restrictive covenants and equitable servitudes, and can be expected to experience severe confusion if the Act opts for a hybrid fourth interest. Second, the easement is the basic less-than-fee interest at common law; the restrictive covenant and the equitable servitude appeared only because of the then-current, but now outdated, limitations of easement doctrine. Finally, non-possessory interests satisfying

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[27] Hollingshead, *supra* note 25, at 328-335. *See, e.g.,* MD. CODE ANN., REAL PROP. § 2-118(c) (West 2010) ("If the restriction is not granted for the benefit of any dominant tract of land, it is enforceable with respect to the servient land, both at law and in equity, as an easement in gross, and as such it is inheritable and assignable.").

[28] Nancy McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 426 n.13 (2005).

[29] C. Timothy Lindstrom, *Hicks v. Downd: The End of Perpetuity?*, 8 Wyo. L. Rev. 25, 35 (2008).

> the requirements of covenant real or equitable servitude doctrine will invariably meet the Act's less demanding requirements as "easements." Hence, the Act's easement orientation should not prove prejudicial to instruments drafted as real covenants or equitable servitudes, although the converse would not be true.[30]

Although conservation easements have a unique statutory nature, the NCCUSL sought to retain the common law of easements of the adopting jurisdiction as a frame of reference for conservation easements. Further, section two of the UCEA states, "a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements,"[31] allowing for the treatment of conservation easements in the same fashion as traditional easements.

Conservation easements, therefore, do not fit into any well-defined category of property law. They are creatures of statute, yet their treatment within many state statutes and the UCEA allow for creation, conveyance, recording, assignment, release, termination and modification in the same manner as easements. Depending on the language in a jurisdiction's statute, certain common law rules applied to traditional easements may defeat a conservation easement that no longer serves the purpose for which it was created.

III. THE DOCTRINE OF CHANGED CONDITION

The common law doctrine of changed conditions stands for the proposition that a court may terminate a servitude on a property when, "changed conditions in and around the property have frustrated the servitude's purpose or created an undue hardship on the owner of the land."[32] Parties raise the doctrine as a defense to

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[30] UNIF. CONSERVATION EASEMENT ACT Prefatory Note (1981).
[31] *Id.* at § 2.
[32] Blackie, *supra* note 14, at 1188.

an injunctive action for violation of a restriction or raise it affirmatively in seeking declaratory judgment that a restriction is no longer enforceable.[33] Application of the doctrine involves two conflicting interests. The party enforcing the restriction has a right to rely on the restrictions, while the change in and around the property may cause the restriction to be inequitable for the challenging party.[34]

The doctrine may be based on two principles: the implied intent of the parties and public policy.[35] When parties create servitudes, they most likely understand that changes in conditions may cause the servitude to lose the benefit for which it was created.[36] From a public policy perspective, allowing servitudes to continue even after their purpose has been frustrated reduces land values and, "turns the law into an instrument of extortion," where the servitude holder can charge an unreasonably high price for release of the restriction that may have little or no value.[37]

Courts generally apply a stringent test to determine if the doctrine of changed conditions will terminate a restriction on land. Generally, application of the doctrine is successful only if the purpose for which the servitude was created can no longer be accomplished.[38] Additionally, courts cautiously apply the doctrine because courts regard property interests as valuable.[39]

Although closely associated with abandonment and the relative-hardship doctrines, the changed conditions doctrine is distinct. Abandonment, or "[t]he relinquishing of a right or interest with the intention of never again claiming it"[40] requires a finding of an intention of relinquishing a right or interest, whereas the doctrine of changed conditions does not. On the other hand, the doctrine of changed conditions is used when, "even though a

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[33] *Id.* at 1206.
[34] RESTATEMENT (THIRD) OF PROP. § 7.10 cmt. a (2000).
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] BLACK'S *supra* note 16, at 2.

servitude no longer serves its intended purpose, the beneficiary does not intend to abandon it."[41]

The doctrine of relative hardship stands for the proposition that, "[i]njunctive relief against violation of the obligation arising out of a promise respecting the use of land will be denied if the harm done by granting the injunction will be disproportionate to the benefit secured thereby."[42] Although similar to the doctrine of changed conditions, the doctrine of relative hardship balances the burden of the landowner and the benefit to the holder of the restriction, while the doctrine of changed conditions relies on the implied intent of the parties.[43] However, some legal scholars regard the doctrine of changed conditions as essentially a reformulation of the relative hardship doctrine.[44]

Although there is no clear rule in determining whether a significant change has occurred in order for the doctrine to apply, courts consider, "the intent of the parties, the foreseeability of the change in conditions, the benefit to the servitude holder, and the duration of the restriction."[45] In analyzing these factors, courts normally consider whether the servitude can continue to serve the original purpose for which it was created, rather than the effect of the change on the value of the burdened land.[46]

When courts examine the implied intent of the parties, they determine whether the original intent of the parties can be carried out despite changed conditions.[47] Rather than determine what the parties would do currently, courts assess, "whether the . . . restrictions remain substantially capable of serving purposes intended when the restrictions were imposed."[48] Courts also

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[41] RESTATEMENT (THIRD) OF PROP. § 7.10 cmt. b (2000).
[42] RESTATEMENT (FIRST) OF PROP. § 563 (1944).
[43] Blackie, *supra* note 14,at 141.
[44] *Id.*
[45] *Id.* at 1209. *See, e.g.,* AC Assocs. v. First Nat'l Bank of Fla., 453 So. 2d 1121 (Fla. 1984) (in which the court determined the implied intent of the servitude holder).
[46] RESTATEMENT (THIRD) OF PROP.§ 7.10. *See, e.g.,* South Shore Homes Ass'n, Inc. v. Holland Holiday's, 219 Kan. 744 (1976) (finding that a change in conditions must be so great as to destroy its purpose).
[47] Blackie, *supra* note 14, at 1209.
[48] AC Assocs. v. First Nat'l Bank of Fla., 453 So. 2d 1121 (Fla. Dist. Ct. App. 1984). *See* Blackie, *supra* note 14, at 1209-10.

consider the location of the changed conditions in relation to the restricted land. When a change occurs to the land surrounding the restricted land, a court is less likely to allow for application of the doctrine than when a change occurs to the restricted land.[49]

Another factor considered by courts is the duration of the restriction. Generally, courts are more likely to apply the doctrine of changed conditions to defeat restrictions of longer duration.[50] Courts find that the longer the duration of the restriction, the less likely it is to comply with the best use of the land.[51]

An illustrative and typical example of a successful affirmative application of the doctrine can be found in *Wolff v. Fallon.*[52] In *Wolff*, the plaintiff purchased a lot containing certain common subdivision restrictions specifying the minimum cost, location of the building, and a restriction limiting the lot use as a private dwelling.[53] The plaintiff's lot bordered an unrestricted lot within the subdivision set aside for commercial development.[54] In arguing for application of the doctrine of changed conditions to defeat the restrictions, the plaintiff introduced evidence that the town zoned lots along the street (including the plaintiff's lot) as a commercial district and that the street adjoining the plaintiff's lot had an increase in commercial vehicles. In addition, the plaintiff introduced testimony by a real estate broker that the lot was no longer suitable for residential purposes.[55] In applying the doctrine of changed conditions in reliance on the evidence, the trial court granted (and the Supreme Court of California affirmed) declaratory relief removing the restrictions from the lot.[56] In applying the doctrine of changed conditions, the court considered both the size of the tract and the location of the change in relation to the restricted area.[57]

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[49] *Id.*
[50] *Id.*
[51] *Id.* at 1212.
[52] Wolff v. Fallen, 284 P.2d 802 (1955).
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*

Similarly, homeowners raised the doctrine as a defense to an injunctive action for violation of a property restriction in *Sandstrom v. Larsen.*[58] In *Sandstrom*, plaintiffs sought an injunction against homeowners in a subdivision for violation of a restrictive height covenant on their property. In defense to the action, the homeowners raised a theory of changed conditions asserting that a thirteen-story condominium building close to the subdivision, obstructing their view, necessitated application of the doctrine.[59] The court ultimately rejected the landowner's argument, finding that the obstruction of the landowner's view was not so great as to allow for application of the doctrine of changed conditions.[60] The court described the standard for application of the doctrine, stating, "the change in conditions must be so great or radical as to neutralize the benefits of the restriction and destroy its purpose."[61] In rejecting the landowner's argument, the court ruled that if the benefits of the original restriction were still realized, application of the doctrine of changed conditions was inapplicable to defeat the restriction on the property.[62]

As these cases suggest, the doctrine of changed conditions is an effective remedy that allows for efficient use of land. In the words of one court, the doctrine, "operates to prevent the perpetuation of inequitable and oppressive restrictions on land use and development that would merely harass or injure one party without benefiting the other."[63] Courts typically apply a sufficiently strict standard in considering application of the doctrine of changed conditions and are generally cautious in allowing the doctrine to defeat valuable interests in land.

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[58] Sandstrom v. Larsen, 583 P.2d 971 (Haw. 1978).
[59] *Id.* at 977.
[60] *Id.*
[61] *Id.* (quoting *South Shore Homes Association, Inc. v. Holland Holiday's*, 549 P.2d 1035, 1044 (Kan. 1976)).
[62] *Id.*
[63] Cortese v. United States, 782 F.2d 845, 851 (9th Cir. 1986).

A. The Doctrine of Changed Condition and its Application to Easements

The doctrine of changed conditions arose as a defense to an action seeking to enforce an equitable servitude.[64] Traditionally, courts applied the doctrine in cases involving real covenants[65] and equitable servitudes[66] and not easements.[67] This is because courts historically viewed easements as distinct and valuable property rights, while treating real covenants with suspicion, subjecting them to greater hurdles against enforcement.[68]

However, a close examination of pertinent law shows that the doctrine is, in fact, applicable to easements.[69] Courts traditionally terminated outdated easements either by "a liberal application of the abandonment principle, or by finding that the purpose of the easement has become impossible to accomplish, or that the easement no longer serves its intended purpose, rather than by the changed-conditions doctrine . . . .;" however, "similar results should be reached under either formulation of the concept."[70] Further, commentators suggest that modern courts may be more likely to apply the doctrine to terminate easements, possibly due to the absence of traditional limitations once imposed on easement doctrine.[71]

Most states allow for application of the doctrine of changed conditions to terminate real covenants and equitable servitudes, but

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[64] Blackie, *supra* note 14, at 1206.

[65] A real covenant is, "A covenant that, because it relates to the land, binds successor grantees indefinitely." BLACK'S *supra* note 16, at 313.

[66] An equitable servitude is, "A private agreement . . . that restricts the use or occupancy of real property" BLACK'S *supra* note 16, at 430.

[67] Blackie, *supra* note 14, at 1213.

[68] Korngold, *supra* note 3, at 436; *see* RESTATEMENT (FIRST) OF PROP, § 450(b) & comment h (1944); Curtis J. Berger, *Some Reflections on a Unified Law of Servitudes* 55 S. CAL. L. REV. 1323, 1330 (1982) (stating, "courts traditionally accord greater deference to easement rights than rights which derive from covenants and servitudes.").

[69] *See* Korngold, *supra* note 3, at 483; *see, e.g.*, AKG Real Estate v. Kosterman, No. 04-0188, 2004 Wisc. App. LEXIS 883, at *23-*25 (Wis. Ct. App. Nov. 3, 2004).

[70] RESTATEMENT (THIRD) OF PROP, § 7.10 Reporter's Note (2000).

[71] *See* Blackie *supra* note 14, at 1214.

fewer states allow for application of the doctrine to terminate easements.[72] However, a number of states have case law allowing for application of the doctrine of changed conditions to terminate easements.[73] For example, in *Hopkins the Florist, Inc. v. Fleming,*[74] plaintiff landowner sought declaratory relief through a denial of defendant's easement of view over plaintiff's land. The easement stated that no obstacle on the plaintiff's land could obstruct the southern view of the street from the defendant's house. The plaintiff argued that because the defendant moved his house there was no longer a southerly view of the street from any of its windows, causing the easement to be extinguished.[75] Although the court did not invoke the doctrine of changed conditions by name, it relied upon a standard in which, "[a] substantial change in the dominant estate may result in the extinguishment of an easement of light and air as where the building to which such an easement is appurtenant has ceased to exist."[76] The court examined the language of the easement, finding that the parties intended to create, "an easement appurtenant only to the house then standing on the . . . [defendant's] property, and that when that house was permanently removed to a location where . . . there is no southerly view of Main Street from any of its windows, the easement was extinguished."[77] Because the language of the easement required that no building on the plaintiff's property obstruct the defendant's view, defendant's act of moving his residence frustrated the original purpose of the easement. In this case, the court applied the

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[72] UNIF. CONSERVATION EASEMENT ACT, *supra* note 30.

[73] See, e.g., Inhabitants of Town of Sabattus v. Bilodeau, 391 A. 2d 357 (Me 1978) (court terminated easement to draw water for fire-protection because dominanet estate made little or no use of servitude and had alternative water source); Hahn v. Baker Lodge, No. 47, A.F. & A.M., 21 Or. 30, 31, 27 P. 166 (1891) (court terminated plaintiff's easement through a building when ingress and egress became impossible after a fire destroyed the building); American Oil Co. v. Leaman, 101 S.E.2d 540 (Va. 1958) (easement for access to public highway terminated after highway was closed); McCreery v. Chesapeake Corp., 257 S.E.2d 828 (Va. 1979) (easement reserved for access to county road terminated when county road was closed.)

[74] 26 A.2d 96 (Vt. 1942).

[75] *Id.* at 97.

[76] *Id.* at 98.

[77] *Id.* at 99.

doctrine of changed conditions to invalidate a restriction that no longer served the purpose for which it was originally created, thereby allowing for efficient use of the land.

B. The Doctrine's Application to Conservation Easements

State conservation easement statutes are relatively new and widespread use of these easements date only from the 1970s.[78] Additionally, there are no opinions in which a court applied the doctrine of changed conditions to terminate conservation easements. However, some legal scholars argue that the doctrine is applicable.[79] As one commentator noted, "[t]he combination of the doctrine of changed conditions and the preservation-appropriate requirements in conservation easement statutes may provide fertile ground for arguments to invalidate easements when plaintiffs . . . can convince a court that the easement no longer serves a purpose the legislature contemplated."[80] If applied successfully to terminate conservation easements, the doctrine could provide a remedy to remove a conservation easement or could be used as a defense in an enforcement proceeding for breach of the conservation easement.[81] When applied with the strict standard by which courts determine whether to invalidate an easement, the doctrine of changed conditions may provide an effective remedy to allow for the efficient use of land. A conservation easement would then become obsolete because it no longer serves the purpose for which it was created.

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[78] RESTATEMENT (THIRD) OF PROP. § 7.11, Reporter's Note (2000).

[79] *See, e.g.,* Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 UTAH L. REV. 1039, 1077 (2007) (stating that the doctrine is applicable to terminate conservation easements, but would not be an easy case to make because proponents of the easement may argue that open space is necessary when surrounding conditions worsen).

[80] Frederic Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future,* 73 DEN. U. L. REV. 1077, 1096 (1996).

[81] Blackie, *supra* note 14, at 1188.

Scholars offer a number of scenarios in which the doctrine of changed conditions may apply. For example, a landowner may invoke the doctrine when development or pollution cause a conservation easement for the protection of a particular species to no longer accomplish its purpose.[82] Another situation in which the doctrine may apply is when a particular species of tree protected by a conservation easement is destroyed and fails to re-grow.[83] As these examples show, narrowly stated purpose statements in conservation easements may cause conservation easements to be more susceptible to termination based on application of the doctrine.[84]

The Restatement (Third) of Property may provide some insight into the application of the doctrine of changed conditions to conservation easements, stating, "[i]f the servitude can no longer be used to accomplish any conservation purpose, it may be terminated . . . ."[85] The Restatement further describes the difference in application of the doctrine to conservation easements, stating that, while termination of an easement normally doesn't entitle the landowner to damages, the termination of a conservation easement does.[86] The Restatement also provides that, as with the doctrine's application to easements, "[c]hanges in the value of the servient estate for development purposes are not changed conditions that permit modification or termination of a conservation servitude."[87]

The UCEA and several states' statutes that have incorporated similar language leave open the possibility of application of the doctrine of changed conditions through a number of provisions.[88] Section 3(b) of the UCEA states that the, "Act

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[82] Korngold, *supra* note 25, at 1077.
[83] *Id.*
[84] *Id.*
[85] RESTATEMENT (THIRD) OF PROP. §7.11(2) (2000).
[86] *See Id.* and cmt. c.
[87] *Id.* § 7.11(4).
[88] *See, e.g.* COLO. REV. STAT. ANN. § 38-30.5-107 (West 2010) (Colorado) (stating that conservation easements may, "in whole or in part, be released, terminated, extinguished, or abandoned by merger with the underlying fee interest in the servient land or water rights or in any other manner in which easements may be lawfully terminated, released, extinguished, or abandoned").

does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity."[89] Further, the UCEA provides for release, modification and termination, "in the same manner as other easements."[90] In the comments to section three, the NCCUSL describe their rationale for this provision in stating that the Act, "leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements . . . ." but also state that, "the doctrine [of changed conditions] is applicable to real covenants and equitable servitudes in all states, but its application to easements is problematic in many states."[91] Reading these provisions and comments together, the language of the UCEA suggests that, "while the application of the doctrine is left to the adopting jurisdiction, the applicable law is the jurisdiction's law of easements, not the law of covenants and equitable servitudes."[92]

Although there are no cases involving the application of the doctrine of changed conditions to terminate a conservation easement, a few cases provide correlations for the doctrine's application. One such case is *Bates Manufacturing Company v. Franklin Company*.[93] In *Bates*, the defendant, over eighty years prior, conveyed to the plaintiff's predecessor in title a lot with a restrictive covenant requiring that the lot be maintained as open space. The restriction also reserved an easement for the defendant to build a canal across the property.[94] Years later the parties entered into an agreement to lease the property for use as a gas station. As part of the lease agreement, the defendant property owner waived his right to enforce the restrictions until the termination of the lease.[95]

One of the issues in this case was whether the restrictive covenant was enforceable in light of commercial development in

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[89] UNIF. CONSERVATION EASEMENT ACT § 3(b) (1981).
[90] *Id.* § 2(a).
[91] *Id.* § 3(b).
[92] Blackie, *supra* note 14, at 1196.
[93] Bates MFG. Co. v. Franklin Co., 218 A.2d 366 (Me. 1966).
[94] *Id.* at 366.
[95] *Id.* at 367-68.

the neighborhood.[96] The area surrounding the land contained drive-in restaurants, service stations, branch banks and supermarkets.[97] After considering the evidence, the court held that the restriction remained valid despite development because of a lack of evidence establishing a change in use of the lot in the entire 88 years of the lot's existence, including the years since the parties created the lease agreement. Contrary to the defendant's assertions, the evidence did not establish that "the change in the character of the neighborhood in the immediate vicinity of the restricted land ha[d] been so radical and permanent as to render perpetuation of the restriction plainly unjust because its original purpose can no longer be accomplished."[98]

Although application of the doctrine of changed conditions to conservation easements remains an unsettled question, a more thorough examination of state enabling acts provides insight into the doctrine's applicability and treatment.

IV. STATE ENABLING STATUTES

As stated previously, at least 49 states and the District of Columbia have statutes that define the scope and applicability of conservation easements within each state. Creation of these statutes arose out of recognition of increased public support for private conservation efforts.[99] Each statute addresses the unique needs of each state.[100] As such, some state enabling statutes vary regarding the issue of termination and modification.

Currently, more than half of all states (including the District of Columbia) either explicitly incorporate the modification and termination language from the UCEA, providing for termination, "in accordance with the principles of law and equity"[101] or provide language similar to this provision.[102] Of

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[96] *Id.* at 367.
[97] *Id.*
[98] *Id.* at 368.
[99] John Walliser, *Conservation Servitudes*, 13 J. NAT. RESOURCES & ENVTL. L. 47, 117 (1997).
[100] *Id.*
[101] UNIF. CONSERVATION EASEMENT ACT § 3(b) (1981).

those states that incorporate this language, most also incorporate the UCEA provision providing for modification and termination, "in the same manner as other easements."[103] Five state's statutes provide for modification of conservation easements through application of the doctrine of changed conditions.[104] Two state's statutes provide for a procedure for modification and termination

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[102] These states include: Alaska, Arizona (additionally directs that courts consider public interest before modifying or amending), Arkansas, District of Columbia, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Nevada, New Mexico, Oklahoma, Oregon, South Carolina, Texas, West Virginia, Wisconsin, and Wyoming, Colorado, Louisiana, Maryland, Pennsylvania (provides that the conservation easement be "broadly construed" in determining whether the conservation easement is consistent with the public policy of the Act), South Dakota, and Vermont.

[103] UNIF. CONSERVATION EASEMENT ACT § 2(a). With the exception of Louisiana (providing for modification and termination, "[I]n the same manner as other servitudes created by contract." LA. REV. STAT. ANN. § 9:1273(A) (2009)), Maryland (providing for modification and termination, "[I]n the same manner as an easement or servitude with respect to the water or land areas, or the improvement or appurtenance thereto . . . ." MD. CODE ANN., REAL PROP. § 2-118(a) (West 2010)) and Vermont (providing only that, [s]uch a right or interest shall be subject to the requirement of filing a notice of claim within the forty year period provided by [the state's Marketable Record Title statute]." 27 VT. STAT. ANN. Tit. 10, § 823 (2010)).

[104] ALA. CODE § 35-18-3(b) (2009) ("This chapter does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity applicable to other easements and specifically including the doctrine of changed conditions."); IOWA CODE ANN. § 457A.2(1) (West 2010) ("A conservation easement shall be perpetual unless expressly limited to a lesser term, or unless released by the holder, or unless a change of circumstances renders the easement no longer beneficial to the public."); ME. REV. STAT. ANN. 33 § 477(3)(B)("[A] conservation easement is limited in duration unless . . . Change of circumstances renders the easement no longer in the public interest as determined by the court."); NEB. REV. STAT. § 76-2,114 (2009) ("The court may modify or terminate the easement pursuant to this section only if the petitioner establishes that it is no longer in the public interest to hold the easement or that the easement no longer substantially achieves the conservation or preservation purpose for which it was created"); N.Y. ENVTL. CONSERV. LAW § 49-0307 (McKinney 2010) (Providing that, if the terms of the conservation easement do not provide for termination or amendment, a court may apply the general real property law of New York, allowing for termination in the event of changed conditions or impossibility.).

after a public hearing.[105] Lastly, thirteen remaining states fail to address the issue of amending or terminating conservation easements.[106]

States that incorporate the modification and termination language from the UCEA provide language adopted from section two of the Act. The pertinent part of the provision states "a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements."[107] Additionally, states that adopt the UCEA language also have statutes that contain a provision stating, "[t]his Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity."[108] As this language suggests, state law regarding modification and termination of easements govern the treatment of conservation easements in the states that have adopted this provision. Problems may arise, however, if the state adopting this language does not have developed law in place to address changed conditions.

To examine how certain state statutes incorporate termination language, the next section examines two states: Arkansas and New York. The Arkansas statute incorporates language from the UCEA allowing for termination and modification of easements in the same manner as other easements. However, Arkansas law fails to provide a remedy for outmoded easements. For this reason, the circumstances under which a conservation easement is extinguishable when the purpose for which it was created is no longer possible remains unclear. In contrast, the New York conservation easement statute provides specific language and circumstances under which a conservation easement may be terminated and, through application of its general real estate law, allows for application of the doctrine of changed

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[105] MASS. GEN. LAWS ANN. ch. 184 §§ 32 (West 2010); N.J. STAT. ANN. § 13:8B-5 (West 2010).

[106] Including California, Connecticut, Florida, Hawaii, Michigan, Missouri, New Hampshire, North Carolina, North Dakota, Ohio, Rhode Island (only allows release of "restriction" by "applicable statutes and regulations." R.I. GEN.LAWS 1956, § 34-39-5 (2009)), Tennesee, and Vermont.

[107] UNIF. CONSERVATION EASEMENT ACT § 2(a).

[108] *Id.* § 3(b).

conditions. The New York law provides a sufficiently strict standard for application of the doctrine to terminate servitudes in the event of changed conditions and alternatively provides for modification and termination as specified within the conservation easement instrument.

A. The Arkansas Conservation Easement Statute

The Arkansas conservation easement presents what the Commissioners of Uniform State Laws may deem a "problematic" application for the doctrine of changed conditions as applied to conservation easements.[109] Although Arkansas' statute provides for modification and termination in the same manner as traditional easements, Arkansas decisional law does not provide a remedy for terminating outmoded conservation easements. Further, although the doctrine of changed conditions is applicable to terminate other servitudes, including restrictive covenants, in Arkansas, application of this doctrine to terminate easements is not available.

Arkansas' conservation easement statute incorporates termination language from the UCEA, allowing for termination in the same manner as other easements and reserving the power of a court to modify or terminate a conservation easement in accordance with principles of law and equity.[110] Therefore, the Arkansas statute allows for termination and modification in accordance with its law of easements.

In Arkansas, there are a few cases in which the doctrine of changed conditions was raised, successfully or unsuccessfully, to terminate restrictive covenants.[111] For example, in *Owens v. Camfield,*[112] a landowner successfully invoked the doctrine of changed conditions to terminate a restrictive covenant limiting use of lots for residential purposes.[113] However, although Arkansas law allows for application of the doctrine of changed conditions to

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[109] *Id. at cmt.* § 3.
[110] *Supra* note 13.
[111] *See, e.g.,* Mcguire v. Bell, 61 S.W.2d 904 (Ark. 1988) (The plaintiff unsuccessfully attempted to invoke the doctrine to cancel a restrictive covenant restricting the use of property to single-family residences)
[112] 614 S.W.2d 698 (Ark. Ct. App. 1981).
[113] *Id.*

terminate restrictive covenants, there is currently no case law in which a court upheld application of the doctrine to terminate an easement.

In a recent decision, the Supreme Court of Arkansas in *Sluyter v. Hale Fireworks Partnership*,[114] explicitly rejected the application of the doctrine of changed condition to easements. In holding that condemnation of part of the plaintiffs' land did not cause termination of a common driveway easement, the Court rejected application of the doctrine stating, "even were we to adopt, which we do not, the changed-conditions doctrine proposed in *Restatement (Third) of Property (Servitudes)* § 7.10 (2000), it would not apply to the facts before us."[115] Although the court demonstrated why the doctrine would fail as applied to the easement in question, the court ultimately rejected application of the changed conditions doctrine to terminate the easement.

The court in *Sluyter* discussed the ways in which an easement may be terminated or extinguished – an issue not previously addressed by the court.[116] Citing to the treatise, *Powell on Real Property*, the court stated, "An easement can terminate either by expiring in accordance with the intent of the parties manifested in the creating transaction, or by being extinguished by the course of events subsequent to its creation."[117] The court further provided a number of examples of termination by extinguishment from the treatise, which include, "release and abandonment . . . prescription and conveyance to a third person having no actual or constructive notice of the easement's existence . . . merger and estoppel . . . mortgage foreclosures, eminent domain and tax sales."[118]

Although this case is instructive in providing methods in which this jurisdiction allows for termination of easements, it is unclear how the methods promulgated by the court would address easements that no longer serve the purpose for which they were originally created. Further, the lack of case law allowing for

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[114] Sluyter v. Hale Fireworks P'ship, 262 S.W.3d 154 (Ark. 2007)
[115] *Id.* at 516.
[116] *Id.* at 514.
[117] *Id.* (citing 4-34 RICHARD W. POWELL, POWELL ON REAL PROPERTY § 34.18 (2005)).
[118] *Id.*

application of the doctrine of changed conditions to easements and the Supreme Court of Arkansas's rejection of the doctrine seem to preclude application.

B. New York's Conservation Easement Statute

Rather than address the nature of conservation easements and its treatment in the same manner as traditional easements, New York's conservation easement statute provides a definition of conservation easements that encompasses a number of servitudes. In New York, a conservation easement is:

> [A]n easement, covenant, restriction or other interest in real property, created under and subject to the provisions of this title . . . for the purpose of preserving and maintaining the scenic, open, historic, archaeological, architectural, or natural condition, character, significance or amenities of the real property. . . .[119]

At first glance, New York's definition of conservation easements seems to incorporate modification and termination laws in accordance with any of these servitudes. However, New York's statute generally provides for modification and termination in accordance with either its general real property law or a procedure delineated in the statute (in the case of a state-owned conservation easement).[120] The statute also provides different requirements for modification and termination of conservation easements within the Adirondack and Catskill Park areas and outside of these areas.[121]

The New York statute allows for modification and extinguishment of conservation easements held by non-profit conservation organizations through the following provision:

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[119] N.Y. ENVTL. CONSERV. LAW § 49-0303(1) (McKinney 2010).
[120] *See Id.* § 49-0307.
[121] UNIF. CONSERVATION EASEMENT ACT § 3(b)

> A conservation easement held by a not-for-profit conservation organization may only be modified or extinguished:
> (a) as provided in the instrument creating the easement; or
> (b) in a proceeding pursuant to section nineteen hundred fifty-one of the real property actions and proceedings law; or
> (c) upon the exercise of the power of eminent domain.[122]

The statute treats conservation easements held by public bodies outside the Adirondack and Catskill parks in a similar fashion, adding an additional provision allowing for extinguishment or modification when required for a major utility transmission facility.[123]

The New York statute also allows for modification and extinguishment of conservation easements held by a public body *inside* the Adirondack or Catskill parks in the same way, unless the conservation easement is held by the state or if land is required for major utility transmission facility.[124] In the case that conservation easements are held by the state, the statute provides for a non-adjudicatory public hearing where the public is given an opportunity to determine whether the conservation easement, "can no longer substantially accomplish its original purposes, or of the purposes set forth [in the policy and statement of purpose section] of this title."[125] This section of the statute further imposes a requirement on conservation easements held by the state or required for major utility transmission facility that "such easement shall be modified or extinguished only to the minimum extent

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[122] N.Y. ENVTL. CONSERV. LAW § 49-0307(1) (MCKinney 2010).

[123] *Id.* § 49-0307(2) (approval of a major utility transmission facility is contingent on the facility receiving a certificate of environmental compatibility and public need).

[124] *See Id.* § 49-0307(3)(c) (a conservation easement held by a public body may be extinguished, "unless such easement is held by the state, in a proceeding pursuant to section nineteen hundred fifty-one of the real property actions and proceedings law . . . .").

[125] *Id.* § 49-0307(3)(d).

necessary to accommodate the facility which is the subject of the certificate of environmental compatibility and public need."[126]

Therefore, except where the conservation easement is held by a public body, inside the Adirondack and Catskill parks, the New York statute allows for termination in accordance with section 1951 of the real property actions and proceedings law. In pertinent part, this provision states:

> No restriction on the use of land created at any time by covenant, promise or negative easement . . . shall be enforced . . . if, at the time the enforceability of the restriction is brought in question, it appears that the restriction is of no actual and substantial benefit to the persons seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished or, *by reason of changed conditions* or other cause, its purpose is not capable of accomplishment, or for any other reason.[127]

Upon finding that restrictions on the land are unenforceable due to changed conditions, accomplishment of its purpose, or any other reason, the covenant, promise or negative easement "shall be completely extinguished upon payment, to the person or persons who would otherwise be entitled to enforce it in the event of a breach at the time of action, of such damages, if any, as such person or persons will sustain from the extinguishment of the restriction."[128]

The New York conservation easement statute then allows for application of the doctrine of changed conditions to terminate conservation easements by incorporating a provision of New York's general real property law. This provision is applicable to

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[126] *Id.* § 49-0307(4).
[127] N.Y. REAL PROP ACTS. LAW § 1951(1) (McKinney 2010) (emphasis added).
[128] *See Id.* § 1951(2).

terminate conservation easements unless the conservation easement is held by the state inside the Adirondack or Catskill Park or subject to other circumstances stated within the statute.[129] New York's conservation easement statute also allows for damages in the event of termination due to changed conditions.

A number of cases further define the standards for termination of covenants and promise or negative easement in accordance with section 1951. New York courts apply a strict standard for application of the doctrine of changed conditions under section 1951, allowing for termination of a restriction where "it is established that the change is such that the restriction has become valueless to the property of the plaintiff and onerous to the property of the defendant."[130] Courts will also invalidate servitudes when enforcing a servitude would be oppressive to other landowners in the area.[131] In order to prove extinguishment of any restriction on land, the party seeking extinguishment has the burden of proving that the restriction has no actual and substantial benefit because of changed conditions.[132] In determining whether the restriction has no actual or substantial benefit, courts look to whether the property is capable of being put to the use required by the restrictions.[133]

New York's conservation easement statute provides a comprehensive framework for the treatment of conservation easements. Although there are no cases in New York where a court terminated a conservation easement, the statute provides specific circumstances for the court to consider.

Additionally, the New York statute contains a provision allowing for modification and termination, "as provided in the

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[129] Again, when held by non-profit organizations, conservation easements may be subject to eminent domain and modification and termination language within the conservation easement instrument. When held by a public body outside the Adirondack or Catskill parks, conservation easements may additionally be subject to requirements for major utility transmission facilities. *See* N.Y. ENVTL. CONSERV. LAW § 49-0307 (McKinney 2010).

[130] Hayes v. Leonard, 291 N.Y.S.2d 570 (N.Y. App. Div. 1968)

[131] *See* McClure v. Leaycraft, 75 N.E. 961 (1905).

[132] *See* Smith v. Sheppard, 754 N.Y.S.2d 122 (N.Y. App. Div. 1968) (finding that defendants failed to meet their burden of proving that subdivision restriction were of no actual and substantial benefit).

[133] Orange & Rockland Utils. v. Philwold Estates, 52 N.Y.2d 253 (1981)

instrument creating the easement."[134] This provision may allow parties to a conservation easement to anticipate and prepare for changes that may occur on the property encumbered by the conservation easement. Provided the instrument's provisions adequately address changed conditions, allowing such flexibility may accomplish the same purpose for which the doctrine of changed conditions is applied. Further, parties to a conservation easement may provide alternative methods by which a conservation easement may be modified to better accomplish its initial purpose or provide for conservation benefits that are equally beneficial.

Therefore, although it still remains unclear what standard a court in New York would use in determining when a conservation easement is no longer viable, New York's strict standard for application of the doctrine of changed conditions may be instructive. Unlike Arkansas' statute, the New York statute comprehensively addresses the issue of conservation easements that no longer serve their purpose while also allowing some flexibility for parties to a conservation easement to provide their own procedure within the instrument.

V. Conclusion

Conservation easements are an effective method of preserving lands for a variety of purposes. However, as time passes changes can occur that may cause a conservation easement to no longer serve the purpose for which it was originally created. A number of states fail to adequately address this issue in their statutes, and may encounter issues when ineffective conservation easements burden land. A comprehensive conservation easement statute, such as the New York statute, adequately and effectively addresses this issue. Where a state's decisional law is unclear regarding changed circumstances, statutory language should provide for application of the doctrine of changed conditions, while also reserving the rights of parties to provide termination and modification language within the conservation easement instrument. The strict standard and caution with which courts

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[134] *See* N.Y. ENVTL. CONSERV. LAW § 49-0307 (McKinney 2010).

apply this doctrine sufficiently ensures that conservation easements will continue to thrive unless they clearly fail to serve their purpose. Further, statutes that allow for language within a conservation easement instrument to determine how a conservation easement should be modified or terminated may provide some flexibility where parties can provide specific ways in which to address changed conditions.